including set-off must be allowed the alien defendant,[8] but to permit counterclaim would violate the general principle that affirmative remedies must be suspended during hostilities.[9]

The Canadian case raises the problem of whether there are any circumstances under which a court will grant relief to an alien enemy plaintiff. It is clear that no relief can be demanded of right. Even in peace an alien has no right enforceable by action to enter the territory of another sovereign,[10] and in war it would seem to be fundamental that a sovereign may arbitrarily restrict or exclude an adherent of the enemy as he pleases. But as soon as the warring nation expressly or by acquiescence allows an alien enemy to remain within its borders without restrictions as to his rights at law, the situation must be viewed in a new light. Such permission connotes protection. One softening of the strict logical consequences of belligerency is already established in the rule that if aliens are caught in foreign territory by the outbreak of hostilities they will be allowed a reasonable time for the removal of their property.[11] And there is further analogy in the doctrine that where an alien enemy is licensed to trade, all his disabilities are removed.[12] It cannot be denied that there are cases which indicate that all alien enemies are under total disability to sue, but almost without exception they have to do with non-resident plaintiffs.[13] On the other hand, there is a distinct body of authority which holds that if the alien is allowed to remain he should be granted all the protective remedies that are essential to the scope of intercourse allowed him,[14] — a view which harmonizes with the modern desire for raising the standard of international ethics in warfare.

WILL A VOID ASSIGNMENT OF THE ORIGINAL LEASE CONSTITUTE A SURRENDER BY OPERATION OF LAW? — The answer to this question turns upon the theory underlying surrenders by operation of law. In a recently decided case in the Supreme Court of Illinois the court answered it in the negative. *Johnson* v. *Northern Trust Co.*, 106 N. E. 814. A tenant under a term for years with the lessor's con-

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[8] See McVeigh *v.* United States, *supra*, at p. 267; Seymour *v.* Bailey, 66 Ill. 288, 297.

[9] Although, as we submit *infra*, an alien enemy who is permitted to remain in the country may sue in the courts as plaintiff, the defendant here would be in the country solely for a special purpose and therefore not entitled to all the rights of those who have been allowed to remain for all purposes.

[10] Poll *v.* Lord Advocate, 35 Sc. L. Rep. 637.

[11] *Cf.* The John Gilpin, 13 Fed. Cas., No. 7,344.

[12] See United States *v.* Cement, 27 Fed. Cas., No. 15,945.

[13] Anthon *v.* Fisher, 2 Doug. 649, n.; Brandon *v.* Nesbitt, 6 T. R. 23; see Russ *v.* Mitchell, 11 Fla. 80.

[14] Maria *v.* Hall, 1 Taunt. 33, n.; Clarke *v.* Morey, 10 Johns. (N. Y.) 69. Chancellor Kent in delivering the opinion in this case brought out the important point that if the alien is within the jurisdiction when war breaks out he may stay with implied permission until expressly ordered away. In the principal Canadian case, where the plaintiff was expressly permitted to stay by an Order in Council, *a fortiori*, the result should be clear. See Russel *v.* Skipwith, 6 Binn. (Pa.) 241; 1 AMER. J. INT. LAW, 463; HALL, INT. LAW, 6 ed., 388.

sent assigned the lease to "the Merrimack Building Company," which entered into possession and made valuable improvements. Subsequently it was discovered that there was no law under which the company could have incorporated, and under such circumstances the law of Illinois allows a collateral attack.[1] The lessor claimed a merger of the term in his reversion through a surrender by operation of law. But the court held that the assignment being void for want of a grantee the term still remained in the original tenant although an equitable interest passed to the associates in the company.[2]

The effect of intent on surrenders by operation of law has long been in dispute. At least a few of the earlier cases based the doctrine on the apparent intent of the parties.[3] But in *Lyon* v. *Reed*, Baron Parke laid down the rule that the act itself constituted the surrender on plain grounds of estoppel, that it was not the result of intention but took place independently and even in spite of intention.[4] This has become the established principle in some jurisdictions.[5] But a strict application of it would have worked great hardship in those cases where the new lease failed to pass the interest which the parties contemplated, although some interest did pass; so the courts refused to apply it there, saying that "if the grant fails contrary to the intent of the parties, it seems unreasonable that an absolute surrender should be presumed to have been intended."[6] And the tendency in recent times has been to get away entirely from the doctrine of estoppel.[7]

What therefore is the situation when the new lease is completely void? It has never been doubted that a new valid lease to the original tenant constitutes a surrender by operation of law.[8] The acts of the parties are so inconsistent with the existence of the original lease that the law will presume a surrender to have been made.[9] But if the second lease is void and consequently it would be unreasonable to make such a presumption (since the parties could not intend that the accept-

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[1] Imperial Building Co. *v.* Board of Trade, 238 Ill. 100, 87 N. E. 167.

[2] If the legal title remained in the original tenant, an equitable interest in the term for years would pass to the associates, (since they in substance dealt with the assignor and paid the consideration for the assignment) on the equitable principle that "equity regards that as done which ought to be done." See STORY, EQUITY JURISPRUDENCE, 11 ed., § 64 *g*. But if there was a surrender they could acquire no such rights as against the landlord, but could recover merely to the extent of the money paid out for improvements, although it is submitted that they still might attack the surrender on the ground that equity will prevent a merger where it would work injustice. See POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 786 *et seq.*

[3] See Wilson *v.* Sewell, 4 Burr. 1975, 1980; Davison d. Bromley *v.* Stanley, 4 Burr. 2210, 2213.

[4] See Lyon *v.* Reed, 13 M. & W. 285, 306.

[5] See Stern *v.* Thayer, 56 Minn. 93, 96, 57 N. W. 329; Welcome *v.* Hess, 90 Cal. 507, 512.

[6] Doe d. Earl of Egremont *v.* Courtenay, 11 Q. B. 702; Doe d. Biddulph *v.* Poole, 11 Q. B. 713. See Coe *v.* Hobby, 72 N. Y. 141, 146.

[7] See Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 569, 579; Smith *v.* Kerr, 108 N. Y. 31, 36; Beall *v.* White, 94 U. S. 382, 389; TAYLOR, LANDLORD AND TENANT, 9 ed., § 512. See also 22 HARV. L. REV. 55.

[8] Wilson *v.* Sewell, *supra*; Van Rensselaer's Heirs *v.* Penniman, *supra*. See VIN.'S ABRIDG., tit. "Surrender," f. (9); TAYLOR, LANDLORD AND TENANT, 9 ed., § 512.

[9] See Van Rensselaer's Heirs *v.* Penniman, *supra*, p. 579.

ance of the bad lease should constitute a surrender of the good one), the courts refused to do so and denied a surrender.[10] Of course in both these cases the same result might be reached on some doctrine of estoppel.[11] But it is submitted that the above reasoning is more conclusive and has the added merit of explaining apparently inconsistent authorities in other cases. Where the lessor with the consent of the original lessee gives a new void lease to a third party who takes possession and pays rent there will be no surrender,[12] although if the lease had been good it would have been otherwise.[13] Yet the case clearly falls within the doctrine of estoppel, for the change of possession consented to by all the parties is an act entirely inconsistent with the existence of the original tenancy. Nor is there any sound distinction between that and the case of an assignment of the lease with the consent of the landlord and followed by a change of possession, as in the principal case. In the one case the tenancy was created by a new lease directly from the landlord, while in the other, by the assignment of the old lease with the consent of the landlord to hold the assignee as his tenant. So if the assignment is good there will be a surrender.[14] But if void it would follow that there should be none, if we look at the intent of the parties, although all the parties are as much estopped as if the new lease had come directly from the landlord. The principal case in denying a surrender would therefore seem to be merely carrying the theory of surrender as based on apparent intent to its logical conclusion, and may mark the collapse of estoppel as the alleged basis of surrenders by operation of law.

RESCISSION WITHOUT PUTTING DEFENDANT IN *STATU QUO*. — Upon the rescission of a contract induced by fraud, a recent New Hampshire case held that the plaintiff might recover a part of what he had given to the defendant without at the same time restoring the consideration he himself had received. *Page Belting Co.* v. *F. H. Prince & Co.*, 91 Atl.

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[10] Davison d. Bromley *v.* Stanley, *supra*; Roe d. Berkeley *v.* Archbishop of York, 6 East 86; See Wilson *v.* Sewell, *supra*, p. 1980; Van Rensselaer's Heirs *v.* Penniman, *supra*, p. 579; Knight *v.* Williams, [1901] 1 Ch. 256, 257; VIN'S. ABRIDG., tit. "Surrender," f. (7); BROWN, STATUTE OF FRAUDS, 5 ed., § 49.

[11] For if the tenant accepts a new lease, there is a representation that the landlord has the power to give it; hence he is estopped to set up its invalidity due to the existence of the original lease. Stern *v.* Thayer, *supra*, p. 96; Welcome *v.* Hess, *supra*, p. 512. But if the second lease is void, it would seem that there being no change of possession or other acts inconsistent with the continuance of the original lease, there can be no estoppel, and the original lease stands.

[12] Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400. See BROWN, STATUTE OF FRAUDS, 5 ed., § 54. Where the new tenant is *cestui que trust* of the original tenant it has been held that there is no surrender. Zick *v.* London United Tramways, Limited, [1908] 2 K. B. 126. Moreover, if there is fraud in giving the new lease, there is no surrender of the old one. Bruce *v.* Ruler, 2 M. & R. 3.

[13] Nickells *v.* Atherstone, 10 Q. B. 944; Davison *v.* Gent, 1 H. & N. 744; Drew *v.* Billings-Drew Co., 132 Mich. 65, 92 N. W. 774; Morgen *v.* McCollister, 110 Ala. 319, 20 So. 54; Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

[14] Thomas *v.* Cook, 2 B. & A. 119; Wallace *v.* Kennelly, 47 N. J. L. 242; Bowen *v.* Haskell, 53 Minn. 480.